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FILED

NOV 15 2012

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DMR

JEFFREY V. COMMISSO,

Plaintiff,

v.

THOMAS WHITELAW LLP, JOSEPH

E. THOMAS, and DOES 1 to 20

inclusive

Defendants

C 12 5867

No.

COMPLAINT FOR

1. Breach of Contract-
Employment Agreement
2. Violations of Cal. Labor
Code §§ 201, 227.3
3. Violations of Cal. Labor
Code § 203

DEMAND FOR JURY TRIAL

GENERAL ALLEGATIONS

1. Plaintiff, Jeffrey V. Comisso, (hereinafter referred to as "Comisso") is a natural person who resides and is domiciled in the State of Minnesota. Before July 2012, Comisso was a resident of California. Comisso is a lawyer licensed to practice in California and Minnesota.

2. On information and belief, Defendant Thomas Whitelaw is a partnership of lawyers with its principal place of business in California. On information and belief, Thomas

1 Whitelaw has also been known as Thomas, Whitelaw & Katz LLP; Thomas Whitelaw, LLP; and
2 Thomas Whitelaw & Tyler, LLP. (Notwithstanding the other names, Defendant will be referred
3 to as “the Thomas Whitelaw firm” or “the firm”). The Thomas Whitelaw firm maintains offices
4 in San Francisco, California.

5 3. On information and belief, although the Thomas Whitelaw firm holds itself out as
6 a limited-liability partnership, at all times relevant to this dispute it has not registered with
7 California Secretary of State or with the State Bar of California in violation of Rules of the State
8 Bar, Rule 3.174; Corporations Code § 16953 et seq.; and Business & Professions Code § 6174.
9 Consequently, pursuant to Cal. Corporations Code § 16306, the Thomas Whitelaw firm’s equity
10 partners are subject to individual liability for the wrongs described in this complaint. On
11 information and belief, all of the Thomas Whitelaw firm’s current and former partners are
12 domiciled in California.

13 4. Defendant Joseph E. Thomas (“Thomas”) is a natural person. On information
14 and belief, Thomas is a lawyer licensed to practice in California and he is, and at all times
15 mentioned was a resident of, and was domiciled in, California. On information and belief,
16 Thomas is a partner who holds the largest percentage of equity and voting power of the Thomas
17 Whitelaw firm.

18 5. Plaintiff does not know the true names or capacities of defendants sued as DOES
19 1 through 20, inclusive. Consequently, Comisso sues these defendants by the fictitious names
20 DOES 1 through 20. When Plaintiff learns the names and capacities of any such defendant, he
21 will amend this complaint to allege those defendants’ true name and capacities.

22 6. On information and belief, Plaintiff alleges that all defendants are, in some
23 manner, partially or equally responsible for the acts and omissions that caused his injuries and
24 damages as alleged in this complaint.

25 7. On information and belief, at all times each defendant was the *alter ego*, joint
26 venture, agent, servant, employee, partner, or surety of the other defendants and was acting
27 within the scope of such venture, agency, employment, partnership, or suretyship, with the
28 knowledge, consent, or ratification of each of the other defendants in doing the things alleged in

1 this complaint. On information and belief, and in the alternative, where any defendant was
 2 acting outside the scope of such venture, agency, employment, partnership, or suretyship, or
 3 without the knowledge, consent, or ratification of the other defendants in doing the things
 4 alleged he is personally liable for doing the things alleged in this complaint. This complaint
 5 refers to all defendants named herein collectively as "Defendants" or "the Firm".

6 JURISDICTION AND VENUE

7 8. This Court has original jurisdiction under 28 U.S.C. § 1332, in that it is a civil
 8 action between citizens of different states and the amount in controversy exceeds \$75,000,
 9 exclusive of interest and costs.

10 9. Venue is proper in this judicial district under 28 USC § 1391(b) because a
 11 substantial part of the events or omissions giving rise to the claims alleged occurred in the
 12 County of San Francisco. Venue is proper in this division under Local Rule 3-2(c) for the same
 13 reason.

14 FACTS GIVING RISE TO COMPLAINT

15 Commisso's Agreement with the Thomas Whitelaw firm.

16 10. Brian D. Henri ("Henri") is a natural person. On information and belief, Henri is
 17 (or was) a partner of the Thomas Whitelaw firm but holds (or held) no equity. Nevertheless at
 18 all times relevant to this complaint, Henri was the managing partner of the firm's San Francisco
 19 office.

20 11. On September 30, 2010, Commisso spoke with Thomas and Henri by telephone.
 21 During this call, Thomas, acting in his capacity as a partner of the Firm, offered to employ
 22 Commisso with the title of "non-equity partner" starting October 11, 2011. As part of the offer,
 23 Thomas promised to employ Commisso at an annual base salary as consideration for
 24 Commisso's services. Separate and distinct from the term of consideration, Thomas promised
 25 that Commisso would have an annual target of approximately 1,800 recorded hours. Thomas
 26 promised that the Firm would pay consideration to Commisso for his employment in the
 27 following form: (i) a monthly draw; and (ii) a year-end distribution. And Thomas promised that
 28 the Firm paid distributions every "six or nine months;" that the 1,800 hour target was not rigid;

1 and that there would be additional compensation for hours recorded in excess of the 1,800-hours
2 target. Thomas also represented to Commisso that the Firm was growing; the Firm management
3 was “transparent;” Commisso would “be treated like every other partner;” and that, in time,
4 Commisso could become an equity partner. Commisso did not immediately accept the
5 employment offer, but asked to consider it and get back to Thomas and Henri.

6 12. On or about October 1, 2010, Commissio telephoned Henri to discuss the Firm's
7 employment offer. Commissio asked Henri how the Firm would calculate and pay the
8 distribution. Henri confirmed that the distribution would be paid, *pro rata*, based on hours
9 recorded. Henri also explained that the hours-recorded-per-year target would be based on
10 Commissio's employment anniversary with the Firm. Commissio also asked Henri how the Firm
11 would compensate Commissio for new business that Commissio brought in to the Firm. Henri
12 assured Commissio that "Thomas will be fair" and pay a reasonable amount for such business.
13 Based on Thomas's and Henri's promises and representations, Commissio accepted the Firm's
14 oral employment offer.

13. On October 4, 2010, Henri telephoned Commisso and asked Commisso to start
14 work on October 6 instead of October 11. As a result, Commisso started working for the Firm
15 on October 6, 2010, in its San Francisco, California, office.

18 14. On information and belief, the Firm has a written partnership agreement. But
19 Commisso has never signed, been asked to sign, or even seen any such an agreement.

October 2010 to October 2011

15. In November or December 2010, Comisso spoke with Henri by telephone.
16. During this conversation, Henri told Comisso that everyone was pleased with Comisso's
17. work. Henri also said that he and Thomas were impressed by Comisso's initial business-
18. development efforts, which Henri said were "unnecessary."

16. Two or three times between October 2010 and October 2011, Henri told
17 Commisso that the firm was doing “great,” that he’d asked “the partners” about Commisso’s
18 work and that “the partners” felt that Commisso was doing a “great job.”

28 17. Although Thomas promised as part of the oral employment agreement that

1 Commisso would be a “partner,” Commisso was a mere employee. Commisso’s compensation
2 was not tied to profit or loss. Commisso was never given any financial information about the
3 firm; he was never asked or allowed to vote on any issue; his input was never solicited on any
4 issue; and he was never given an ownership interest in the Firm. Moreover, Commisso had to
5 obtain authorization to purchase supplies, such as books or on-line resources.

6 18. On information and belief the Thomas Whitelaw firm has a pattern and practice
7 of mischaracterizing at-will employees as “non-equity partners” to avoid expenses, e.g., state
8 and federal taxes, SSI withholding, workers-compensation insurance and other benefits.
9 Between October 2010 and February 2012, a half dozen of the Firm’s attorneys were either fired
10 or left the Firm’s employ on their own.

Thomas Whitelaw Refuses to Pay Commissio

12 19. On October 6, 2011, Comisso completed his first year of work for the Firm. At
13 this point the Firm should have paid him his distribution for the 2010–2011 year per the terms of
14 the oral employment agreement. However, the Firm did not pay Comisso his distribution.

15 20. On October 24, 2011, Commisso sent Thomas an e-mail about (i) Commisso's
16 2010–2011 distribution; and (ii) Commisso's compensation/billable-rate for 2011–2012. With
17 respect to the distribution, Commisso asked for his *pro rata* payment based on the billable hours
18 he recorded. Thomas did not respond to this e-mail. On November 7 and 16, 2011, Commisso
19 sent Thomas follow-up e-mails about these subjects. Again, Thomas did not respond.

20 21. On November 28, 2011, Commisso met with Thomas in Thomas's office. During
21 this conversation, Thomas explained that the Firm would likely not increase Commisso's
22 compensation for 2011–2012; that Commisso's employment at the firm was no different from "a
23 fourth-year associate;" and that Commisso was as fungible to the Firm as Thomas's gardener
24 was to him. Still, Thomas agreed that the Firm owed Commisso a distribution. Prior to
25 authorizing payment of the distribution, Thomas indicated that he needed to "check the
26 numbers" before he could authorize payment. Thomas promised to get back to Commisso the
27 next week.

28 22. On November 30 and December 9, 2011, Commisso sent Thomas further e-mails

1 following up on the November 28, 2011, meeting. Thomas did not respond to these e-mails until
2 December 12, 2011, when Thomas scheduled a telephone call for the next day. However,
3 Thomas did not call the next day.

4 23. On December 14, 2011, Thomas and Commisso spoke by telephone. Commisso
5 asked Thomas whether he agreed that the Firm should pay Commisso's distribution. Thomas
6 said "yes, pro rata," but again said that he wanted to look at the numbers. Thomas promised to
7 get back to Commisso the next week. Within minutes of termination of the call with Thomas,
8 Commisso sent Thomas copies of e-mails from the Firm's internal accounting staff that
9 identified Commisso's recorded billable hours for the 2010-2011 year as well as Commisso's
10 client revenue for the same term. The hours billed by Commisso entitled him to a *pro rata*
11 distribution payment equivalent to 80% of the goal under the terms of the oral employment
12 agreement between Commisso and the Firm.

13 24. On January 3, 2012, Comisso sent Thomas another e-mail following up on their
14 November 28, 2011, meeting and December 14, 2011, telephone call. Thomas responded on
15 January 5, 2012, and promised to get back to Comisso the next week; however, Thomas did
16 not do so.

17 25. The week of January 16, 2012, Henri contacted Commisso. Henri said that
18 “everyone” was “happy with Commisso’s work,” that there were no issues, and that “everyone”
19 agreed that they would like to send more work to Commisso.

20 26. On or about February 9, 2012, Commisso left Thomas a voicemail again
21 inquiring about the status of Commisso's distribution. Thomas responded by e-mail and
22 promised to call Commisso on February 20, 2012. Thomas did not call.

23 27. On February 23, 2012, Commissio sent Thomas another follow-up e-mail
24 concerning the 2010–2011 distribution payment and compensation rate for 2011–2012.

Comisso's Employment Ends

26 28. On February 27, 2012, Thomas and Commisso spoke by telephone. Contrary to
27 the terms of the agreement between Commisso and the Thomas Whitelaw firm, Thomas said that
28 the Firm would not pay Commisso any part of his 2010-2011 distribution. Commisso told

1 Thomas that this was a material change in the parties' agreement; that non-payment of the
 2 distribution was not what the parties had agreed to, and that non-payment of the distribution was
 3 neither fair nor reasonable. At this point, Thomas said that Commissio could accept this or that
 4 Commissio could "...go right now, we will take you off the website today, and you can file a
 5 claim." Shocked, Commissio said that he would get back to Thomas the following day. Thomas
 6 agreed.

7 29. On February 28, 2012, Commissio called Thomas to finish the prior day's
 8 conversation. But Thomas did not respond to this call. Instead, Henri returned Commissio's call.
 9 Henri said he wanted to "look at the numbers" and would get back to Commissio later that day.
 10 When Commissio and Henri spoke that afternoon, Henri, acting in his capacity as an agent of the
 11 Firm, said that the Firm would pay Commissio less than one-third of the distribution that it owed
 12 to him per the terms of the agreement. Commissio did not accept the Thomas Whitelaw firm's
 13 revised offer. When Commissio said "no," Henri responded "then pack your shit and get out
 14 now." Commissio hung up the phone, packed what things he could, and left the Thomas
 15 Whitelaw firm premises.

16 30. On March 9, 2012, Commissio wrote to the Firm requesting that the Firm (i) turn
 17 over his remaining personal electronically-stored information maintained on the Thomas
 18 Whitelaw firm's computer system; and (ii) to pay him his wages due. The Firm refused.
 19 Among the electronically-stored information wrongfully withheld by the Firm are writings that
 20 document the parties' agreement.

21 **FIRST CAUSE OF ACTION**

22 **Breach of Contract**

23 31. Commissio incorporates and realleges Paragraphs 1-30.

24 32. A valid and enforceable oral contract existed between Commissio and the Thomas
 25 Whitelaw firm for at-will employment.

26 33. Commissio has at all times performed the terms of the contract in the manner
 27 specified by the contract.

28 34. Defendants failed and refused, and continue to refuse, to tender performance as

required by the contract in that, on or about February 28, 2012, they refused to pay Commissioner the money that they owed him.

35. Defendant's failure and refusal to perform its obligations under the contract has damaged Commisso; Commisso has suffered and continues to suffer damages in amount to be proved at trial but in excess of \$75,000.

SECOND CAUSE OF ACTION

Labor Code Violations

36. Commisso incorporates by reference and realleges Paragraphs 1-35 above.

37. On February 28, 2012, at the time that Defendants terminated Comisso's employment, Comisso had last been paid on February 1, 2012 and was owed wages for his work from 2010 to 2011 and for his performance from February 1, 2012 to February 28, 2012, in a total amount in excess of \$75,000 as provided for in the employment agreement.

38. At the time of termination, Defendants failed to pay Commisso any of the amounts due as set forth above. Defendants failure to pay the full amount due Commisso on termination violates the provisions of the California Labor Code sections 201 and 227.3. There is now due and owing to Commisso the sum of at least \$75,000. Defendants failed and refused, and continue to fail and refuse to pay the amount due.

39. Pursuant to California Labor Code section 218.5, Commisso requests that the Court award Commisso reasonable attorney's fees and costs incurred by him in this action.

40. Pursuant to Labor Code section 218.6, Commisso requests that the Court award Commisso interest on all due and unpaid wages, at the legal rate specified in California Civil Code section 3289(b), accruing from the date the wages were due and payable.

THIRD CAUSE OF ACTION

Violation Labor Code Section 203

41. Commisso incorporates by reference and realleges Paragraphs 1-40 above.

42. The Defendants' failure to pay wages, as alleged above, was willful in that Defendants knew they owed the wages to Comisso; Comisso made clear and straightforward demands for payment of wages highlighting the legal consequences for Defendants' continued

1 willful failure to do so, thus entitling Comisso to penalties under Labor Code section 203,
2 which provides that an employee's wages shall continue as a penalty until paid or for a period of
3 up to 30 days from the time they were due whichever period is shorter.

4 43. Defendants failed to pay Comisso the sum due him at the time of termination
5 and have failed to pay those sums for more than 30 days thereafter. Pursuant to the provisions of
6 California Labor Code section 203, Comisso is entitled to a penalty in the amount of \$10,000,
7 which amount is the product of his daily rate multiplied by 30 days.

8 **JURY DEMAND**

9 Plaintiff, Jeffrey V. Comisso, demands a trial by jury in this matter.

10 **PRAYER**

11 WHEREFOR, Comisso prays for judgment against Defendants and each of them as follows:

12 1. For damages for breach of contract according to proof;
13 2. For interest on that amount from February 28, 2012;
14 3. For penalties pursuant to California Labor Code;
15 4. For reasonable attorney's fees incurred by Comisso;
16 5. For costs of suit incurred by Comisso; and
17 6. For such other and further relief as the Court deems proper.

18 November 15, 2012

19 HIGA & GIPSON, LLP

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By 
RONNIE R. GIPSON JR.

Attorneys for Jeffrey V. Comisso